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No. 82-494

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

BATH IRON WORKS CORPORATION,

and

AMERICAN MUTUAL LIABILITY
INSURANCE COMPANY,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

DONALD J. SIMPSON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether the First Circuit Court of Appeals was correct in ruling that Calbeck v. Travelers Insurance Co., 370 U.S. 114 (1962), which extended the jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA") to new ship construction over navigable waters, should apply retroactively to a compensable injury that occurred twenty-one (21) years prior to Calbeck, when the case law provided, under the "maritime but local" doctrine, that the claimant could recover workers' compensation benefits only under state law.

2. Whether the First Circuit Court of Appeals was correct in reaching a result different from that which the Fifth Circuit Court of Appeals reached on similar facts in Shea v. Texas Employers' Ins. Assoc., 383 F.2d 16 (5th Cir. 1967), by ruling that an employee injured before 1972 could pursue a claim under the LHWCA after litigating a claim for state workers' compensation benefits to a successful conclusion, despite the clear and unequivocal language in 33 U.S.C. § 903(a) that compensation under the LHWCA was payable:

> ". . . only if the disability or death results from an injury occurring upon the navigable waters of the United States. . . and if recovery for the disability or death through workers' compensation proceedings may not validly be provided by State law."
> (Emphasis added)

LIST OF PARTIES*

The parties in case No. 81-1455 were Donald J. Simpson, as petitioner, and the Director, Office of Workers' Compensation Programs, United States Department of Labor, Bath Iron Works Corporation and American Mutual Liability Insurance Company, as the respondents.

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*Petitioner, Bath Iron Works Corporation, reports, pursuant to Rule 28.1 of the Rules of this Court, that Bath Iron Works Corporation is a wholly owned subsidiary of Congoleum Corporation.

Petitioner American Mutual Liability Insurance, reports, pursuant to Rule 28.1 of the Rules of this Court, that American Mutual Liability Insurance Company has the following affiliates: American Mutual Insurance Company of Boston, American Policyholders' Insurance Company, American Mutual Life Insurance Company, American Mutual Corporation, Boothbay Mutual.

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DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

DONALD J. SIMPSON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Petitioners Bath Iron Works Corporation (Bath) and American Mutual Insurance Company (American Mutual) pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, which applied Calbeck v. Travelers Insurance Company, 370 U.S. 114 (1962) retroactively to an injury that

occurred during activity "maritime but local" twenty-one (21) years before the Calbeck decision, thereby retroactively extending the petitioners' workers' compensation liability under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901 et. seq., and which held that litigation to a judgment in State workers' compensation proceedings did not bar an employee injured before 1972 from proceeding with another claim for the same injury under the LHWCA, despite that language in 33 U.S.C. § 903(a) which provides that compensation was payable under that Act only if recovery may not validly be provided by State law.

OPINIONS BELOW

The opinion of the Supreme Judicial Court of the State of Maine, issued on May 18, 1949, is reported as Simpson's Case, 144 Me 162 (Me. 1949), and appears as Appendix E (App. 66a-72a) hereto. The Decision and Order of the Administrative Law Judge (No. 78-LHCA-957), issued on November 3, 1978, is not reported but appears as Appendix D (App. 63a-65a) hereto. The Decision and Order of the Benefits Review Board (No. 78-620), dated June 11, 1981, is reported at 13 BRBS 970 and appears as Appendix B (App. 21a-47a) hereto. The dissenting opinion of Administrative Appeals Judge Miller, issued separately on July 28, 1981, is reported at 13 BRBS 983, and appears as Appendix C (App. 48a-62a) hereto. The Opinion of the United States Court of Appeals for the First Circuit (No. 81-1455), from which certiorari is sought, dated June 23, 1982, is not yet reported but appears as Appendix A (App. 1a-20a) hereto.

JURISDICTION

The Court of Appeals' Decision in this case was rendered on June 23, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTES

The relevant statutory provisions are set forth as Appendix G (App. 74a-76a) hereto.

STATEMENT OF THE CASE

This case raises a question that the Benefits Review Board characterized as "an issue of first impression" with "important and potentially far reaching effect". (App. 22a) The issue on appeal is whether an employee, who was injured in 1941 while working on a ship under construction and who received the maximum state workers' compensation benefits allowed by law, is entitled to compensation under the version of 33 U.S.C. § 903(a) in effect at the time of his injury.[1] That section provided:

> (a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.

The essential facts of this case were undisputed. On November 21, 1941, Mr. Simpson, while in the employ of Bath Iron Works Corporation, sustained a severe spinal injury when he fell to the ground from the deck of a vessel under construction. As a result of the injury, Mr. Simpson has been

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[1] In 1972, § 3(a) was amended. The parties agree that those amendments had no effect on Simpson's already existing claim.

totally disabled. Following the accident, he retained counsel and sought relief under the Workmen's Compensation Act of the State of Maine. After obtaining the maximum compensation benefits allowed under the State Act, Mr. Simpson, through counsel, brought an additional claim in an attempt to obtain medical benefits under the State law in excess of the $6,000 ceiling on compensation. The matter was litigated to a conclusion in the Maine Supreme Judicial Court and the decision of that Court establishes that the Employer satisfied its obligations under the State Act and paid to Mr. Simpson the maximum benefits to which he was entitled under State law. Simpson's Case, 144 Me. 162 (1949) (App. 66a).

The decision in Simpson's Case was rendered in 1949. The decision itself establishes that compensation payments under State law ended on April 8, 1948. At that time, Mr. Simpson gave to the Employer a settlement receipt acknowledging that the full sum of monies owed under State law had been paid to him. In April of 1977, 36 years after the injury and 29 years after satisfaction of the State judgment, Mr. Simpson filed a claim for benefits for the injury of November 21, 1941 under the Longshoremen's and Harbor Workers' Compensation Act.

Because the questions surrounding the nature and extent of necessary medical services covering a 36-year span of time were extraordinarily complex, and because of the substantial nature of the jurisdictional issues, the parties agreed to bifurcate the hearing and to present to the Administrative Law Judge only the issues involving the jurisdictional issues involved in this claim for compensation. The Administrative Law Judge, construing 33 U.S.C. § 903(a), and relying on the decision of the Fifth Circuit Court of Appeals in Shea v. Texas Employers' Ins. Assoc., 383 F.2d 16 (5th Cir. 1967), denied the claim for compensation and held that Mr. Simpson had no right to benefits under the Longshoremen's Act because the State judgment conclusively established that recovery was validly provided by State law, and the claim was therefore no longer covered under § 3(a), which provided for benefits "only if recovery for disability or death through workmen's compenation proceedings may not validly be provided by State law" (App. 63a-65a).

On appeal, the Benefits Review Board affirmed the dismissal of the Employee's claim, although it reached its result based upon a rationale different from that articulated by the Adminisrative Law Judge. The Benefits Review Board held that the Supreme Court's decision in Calbeck v.

Travelers Ins. Co., 370 U.S. 114 (1962), which extended the jurisdictional scope of the Longshoremen's and Harbor Workers' Compensation Act of 1927, and upon which the Employee based his claim, could not be retroactively applied so as to confer the jurisdiction of the LHWCA to this case. The Benefits Review Board, in an extensive opinion, analyzed the considerations that apply to the question of retroactivity, as set forth in the case of Chevron v. Huson, 404 U.S. 97 (1971). The Benefits Review Board concluded that at the time of the injury of the Employee in this case, Bath Iron Works, which was engaged exclusively in new ship construction, fell within the well established "maritime but local" doctrine, which meant that Bath's employees could recover workers' compensation benefits only under State law. Therefore, the Employer had no reason to believe that the Longshoremen's Act was applicable and had no reason to file a first report of injury within 10 days of the injury, which is required by 33 U.S.C. § 930(a), in order to trigger the commencement of the one-year limitation for the filing of a claim. 33 U.S.C. § 913(a); 33 U.S.C. § 930(f). Moreover, the Benefits Review Board concluded that the decision in Calbeck to extend concurrent federal jurisdiction to areas that were traditionally the exclusive province of state

workers' compensation acts was not clearly foreshadowed by prior case law, which the Court characterized as being "frequently unclear and conflicting". (App. 42a) Noting that one of the purposes of Calbeck was to avoid the situation where an employee might be left without a remedy by virtue of a "vacuum" of coverage in areas where state acts do not cover maritime workers within areas of "local concern", the Board concluded that this consideration was not applicable to this claim in view of the fact that Mr. Simpson received State benefits and was not left without remedy. Expressing concern that a retroactive application of Calbeck would produce a flood of litigation of stale and uncertain claims, and noting the unfair impact of such a retroactive application on employers similarly situated to Bath Iron Works, the Benefits Review Board refused to apply Calbeck retroactively and affirmed the decision and order of the Administrative Law Judge denying benefits, holding that the Employee was not covered by the federal Act as the result of application of the "maritime but local" rule, which was incorporated in 33 U.S.C. § 903(a) at the time of his injury.[2]

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[2]The Benefits Review Board, because it resolved the case on the issue of coverage, did not reach the other issues raised on appeal: 1) whether the injury occurred over navigable waters; 2) whether

The Court of Appeals for the First Circuit reversed the Benefits Review Board, and held that the extension of jurisdiction set forth in Calbeck should be applied to workers' injuries that antedated the decision. The First Circuit expressly acknowledged that it was addressing a question on which the Supreme Court had not yet given explicit guidance (App. 9a). Moreover, the Court of Appeals acknowledged that Calbeck's line of analysis stunned most legal commentators and was not clearly foreshadowed (App. 11a, 12a). Analyzing the same cases that were considered extensively by the Benefits Review Board, the First Circuit reached a different result. Moreover, unable to distinguish the decision of the Fifth Circuit Court of Appeals in Shea v. Texas Employers' Ins. Assoc., supra, the Court of Appeals refused to follow Shea, stating that the Fifth Circuit "misapprehended the import of Calbeck" (App. 19a).

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res judicata or the doctrine of election of remedies applies; 3) whether the claim is barred by the statute of limitations and the equitable doctrine of laches; and 4) whether the § 20(a) presumption applies to the issue of jurisdiction (App. 47a).

STAGES AT WHICH FEDERAL QUESTIONS WERE RAISED AND PRESERVED

Both Bath Iron Works Corporation and its insurer, American Mutual Liability Insurance Company, requested dismissal of this claim under 33 U.S.C. § 903(a), expressly relying on the decision of the Fifth Circuit Court of Appeals in Shea v. Texas Employers' Ins. Assoc., supra, and expressly opposing retroactive application of Calbeck. All three bodies below specifically ruled on the issues presented in this Petition (App. 1a-20a, 21a-62a, 63a-65a).

BASIS FOR FEDERAL JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) to pass upon the Court of Appeals' interpretation of Section 903(a) of the Longshoremen's and Harbor Workers' Act of 1927.

ARGUMENT

This case deserves plenary review by this Court because it presents "an issue of first impression" with "important and potentially far reaching effect" (App. 22a), which requires interpretation of a federal statute and the manner in which that statute is affected by a decision of this Court. If the Decision of the First Circuit Court of Appeals is not overturned, employers who were involved in new ship construction during the 1940's and 1950's will be faced with the impossible task of attempting to produce "substantial evidence" to rebut the presumption of compensability of injuries up to 40 years old. See 33 U.S.C. § 920(a). The difficulty inherent in the production of evidence to establish notice defenses, or to contest the nature and extent of past disability without the opportunity for medical examination, or to establish the availability of suitable alternate employment in the employee's community during a claimed period of past disability, needs no further elaboration. Moreover, the statute of limitation contained in the LHWCA will not be a defense available to employers in view of the fact that, as the Benefits Review Board noted, the statutory periods will not run in view of the fact that employers who could not foresee future judicial extension of federal jurisdiction

justifiably satisfied their compensation obligations by paying benefits under state workers' compensation law and failed to file federal first reports of injury. The Decision of the Court of Appeals, if not overruled, will produce a flood of stale litigation.[3]

I. The Decision of the Court of Appeals to Apply Calbeck Retroactively was Erroneous

A. Factors to Consider in Determining Whether a Case is to be Given Retroactive Effect.

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[3]The Benefits Review Board, which is intimately connected with the Administration of the Longshoremen's Act, considered that retroactive application of Calbeck would produce a flood of litigation from workers and employers similarly situated to the claimant and the employer in this case (App. 45a). The First Circuit was "unmoved by the Board's fear of a flood of litigation" stating that that fear was "illogical" for the reason that any litigation stimulated by Calbeck would have developed in the 1960's and not in the 1980's (App. 16a). The First Circuit ignored the fact that its decision was the first decision of any Court of Appeals that applied Calbeck retroactively. Moreover, it ignores the fact that the only other case dealing with the question of whether an employee injured in new ship construction, who recovered state benefits pursuant to a State judgment, may thereafter pursue a claim under the Longshoremen's Act, was the case of the Fifth Circuit Court of Appeals in Shea v. Texas Employers' Ins. Assoc., supra. Shea, decided by the Fifth Circuit in 1967, undoubtedly discouraged any such claims.

The traditional presumption is that Court decisions are intended to receive general retroactive effect. It has been established, however, that both state courts, see Great Northern Railway v. Sunburst Co., 287 U.S. 358 (1927), and federal courts, see Linkletter v. Walker, 381 U.S. 618 (1965), may legitimately conclude that justice requires a decision to be applied nonretroactively. Modern courts have frequently held that cases are to be applied prospectively only where a well-settled rule of law is overturned, and it appears unfair and unnecessary to upset the expectations of the parties. E.g., Linkletter, supra. The Supreme Court set forth a three-pronged test to determine whether to apply a rule prospectively only in the case of Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). The following factors determine whether a decision will be applied prospectively only: (1) it must establish a new principle of law, either by overruling clear past precedent or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) retroactive application will not further the purposes of the rule; and (3) it would be inequitable to apply the rule retroactively. Chevron Oil Co, supra at 106-107. The First Circuit Court of Appeals in this case stated that the central question of retroactivity is:

> ...was reliance on a contrary rule so

> justified and the frustration of expectation so detrimental as to require deviation from the traditional presumption of retroactivity (App. 9a)?

The Court of Appeals, before applying Chevron Oil's factors to the case presently before the Court, addressed the question of whether the factors, including the issue of reliance, should be analyzed in light of the particular litigants in the given case, or in light of general patterns throughout society (App. 9a). The Court of Appeals acknowledged that the Supreme Court has not yet given explicit guidance on this issue, and candidly acknowledged that its view differed from the Court of Appeals for the District of Columbia, and that this difference had an impact in the resolution of the case. See App. 9a; Wachovia Bank & Trust Co. v. National Student Marketing Corp., 650 F.2d 342 (D.C. Cir. 1980). The Court below concluded that general perspectives should control, and that decisions on retroactivity should not be affected by specific and possibly abberational facts in a given case. To this extent, the petitioners concur with the reasoning of the Court of Appeals. The Court below then erroneously considered the question of retroactivity by analyzing the state of the law at the time when Calbeck was handed down, rather than by analyzing the law at the time the particular claim in this case arose (App 10a-11a). The Court of Appeals specifically acknowledged its

disagreement with the Court of Appeals for the Circuit of the District of Columbia in this respect. See (App. 11a, fn. 8). The Court below erroneously assumed that an analysis of the state of the law at the time a claim arose would place undue emphasis on the particular litigants' reliance interests, rather than on general patterns throughout society. In this regard, it ignored its own statement that the circumstances of particular litigants are important when they typify general patterns of reliance (App. 10a). To the extent that the state of the law at the time a particular claim arose affects general patterns of reliance in that law at that time, it must be considered in the analysis of the question of retroactivity. The Court of Appeals' conclusion to the contrary effectively removed the third factor from the Chevron Oil analysis of retroactivity. It is impossible to measure the reasonableness and extent of reliance of the part of the employer in paying state act benefits and in not filing federal forms for a 1941 injury by examining the law as it obtained in 1962.[4]

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[4]Had the Longshoremen's and Harbor Workers' Compensation Act been applicable to Mr. Simpson's claim, the employer would have been obligated to file a First Report of Injury within ten days of the injury of November 21, 1941. 33 U.S.C. § 930. Had the employer filed the Report in this case, the

Plenary review of the Decision of the Court of Appeals should be granted with respect to this aspect of the Court's Decision alone. It is necessary to clarify on what basis decisions of this Court will be retroactively applied, and to resolve a dispute between the Circuit Courts of Appeal.

B. Benefits Review Board was Correct in Refusing to Apply Calbeck Retroactively to This Case, and in Ruling that the Claim for Benefits Under the LHWCA was Barred by 33 U.S.C. § 903(a).

The Decision of the Benefits Review Board not to apply Calbeck retroactively to this claim followed closely the analysis set forth by the Supreme Court in Chevron Oil Co. v. Huson, supra.

Chevron Oil's first factor focuses on how much a decision changes the law. The Benefits Review Board indicated that consideration of this issue required a review of the case law upon which the employer relied during the time period from November, 1941, when the injury occurred, through April, 1948, when the last payment of state compensation was made. The Benefits Review Board specifically focused on this period of time in reliance upon the opinion of the First Circuit Court of Appeals in the case of Jackson v. Justices of the Superior Court,

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one-year statute of limitations in 33 U.S.C. § 913(a) would have barred this claim if filed after December of 1942.

549, F.2d 215, 218 (1st Cir. 1977), cert. denied 430 U.S. 975 (1977) (App. 29a-30a).[5] A brief review of the status of the case law should be helpful in placing the question of retroactivity in context.

Ten years prior to the passage of the orginal Longshoremen's and Harbor Workers' Compensation Act, the Supreme Court held that states were without power to extend their compensation remedies to longshoremen injured on the seaward side of the pier. Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917). This decision left such longshoremen without any compensation remedy while their fellow workers who were employed on the pier itself enjoyed the protection of state compensation statutes. Recognizing that the Jensen decision operated to deprive thousands of workers of compensation benefits, Congress attempted twice to mitigate its effect by legislation expressly allowing state compensation statutes to cover injuries on navigable waters within the reach of state jurisdiction. Each time, however, the Supreme Court held that such a statute unlawfully delegated federal congressional powers to the states. Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920); Washington v. Dawson & Co., 264 U.S. 219 (1924).

In 1922, the Supreme Court itself modified Jensen

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[5]The First Circuit withdrew its "dictum" in the Jackson case in fn. 6 of its opinion in this matter (App. 92).

in Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1922). In Rohde, a shipbuilder's employee was injured while at work on new construction, which was afloat on navigable waters. The applicable workmen's compensation statute was exclusive and required notice to the proper state authority if it was desired to pursue a claim within the Act. No such notice was given. A judgment was recovered under a liable in admiralty, which the Supreme Court reversed, ruling that the accident was among those "...certain local matters regulation of which (by the state) would work no material prejudice to the general maritime law." Id. at 477. Thus, Rohde established that a state could validly enact state worker's compensation covering employees engaged in shipbuilding. This case was still good law at the time of Calbeck. Calbeck, supra, at 138 (Stewart, J., dissenting; 4 Larson, Workmens' Compensation Law, § 89.25, 16-168 (1981).

Although the Supreme Court in Rohde restricted the bar of the Jensen case, a large proportion of coastal workers remained outside the range of any non-fault compensation protection. This situation prompted Congress, in 1927, to enact the Longshoremen's & Harbor Workers' Act. The original Act provided that federal compensation benefits would be payable in the event of injury to or death of an employee

> ...only if the disability or death results from an injury occurring on the navigable

> waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not be validly provided by state law.... 33 U.S.C. § 903(a) [emphasis added].

By virtue of the clear language of the statute and the Rohde decision, Donald Simpson did not have any right to benefits under the Longshoremen's and Harbor Workers' Act as of the date of his injury in November of 1941. The Court of Appeals noted that when this situation was changed by Calbeck, the analysis contained in that decision stunned most legal commentators (App. 11a; see fn. 9). A brief review of the case law after 1941 supports that statement.

The employee relied heavily in the Court below on the case of Parker v. Motor Boat Sales, 314 U.S. 244 (1941). The facts of Parker, however, are distinguishable from this case. It involved a shore-based employee who drowned when a boat in which he was riding capsized on a navigable river while testing one of the defendant's outboard motors. The Court decided the case by focusing on the character of the activity at the moment of the injury. Id. at 247. The Court concluded that the plaintiff was clearly engaged in maritime activity and ruled that there was exclusive federal jurisdiction. In reaching this decision, the Court must have held that the State of Virginia could

not have provided a compensation remedy for this injury since it recognized that "Section 3(a) appears to be a subtraction from the scope of the Act." Id. at 249. This conclusion is bolstered by the Court's citing of the Act's purpose "to provide for federal compensation in the area which the specific decision referred to placed beyond the reach of the states." Id. Obviously, after Rohde, it was clear that a state could constitutionally enact a state compensation system covering employees engaged in shipbuilding. Thus, Parker did not foreshadow Calbeck.

Subsequent to Parker, a significant development occurred with the case of Davis v. Department of Labor and Industries of Washington, 317 U.S. 249 (1942). The Supreme Court concluded that the uncertainty and voluminous litigation created by the "maritime but local" and "maritime and national" dichotomy was intolerable. The Court established a "twilight zone,"[6] which could give rise to either state or federal compensation entitlement, depending on the workman's election. The twilight zone arose because courts were facing a difficult, if not impossible, task in attempting to determine whether

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[6]Any possible doubt as to the basis of the Parker decision was resolved in Davis, where the Court explained Parker in terms of the "twilight zone." Calbeck, supra at 138, fn. 8 (Stewart, J. dissenting).

a state could grant protection under its compensation act. Id. at 252. Thus, the twilight zone was adopted to create a presumption of applicability by either act under which an employee elects to receive coverage where it could not be determined with certainty prior to litigation whether the state Act could constitutionally grant benefits.

Creation of the "twilight zone" did not foreshadow the Calbeck decision because it was not the purpose of the Court in Davis to allow the Act to encroach upon areas where a state could clearly enact compensation statutes. In adopting the "twilight zone", the Court remained cognizant of the Section 3(a) limitation. It cited Congress' purpose "to permit state compensation protection wherever possible or whenever possible, by making federal law applicable only 'if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law'." Id. at 252-53. Furthermore, Davis was an affirmative state award case. The Supreme Court held that a state could, consistent with the Federal Constitution, issue an award under its state compensation law to the widow of a workman engaged in dismantling an abandoned drawbridge who fell from a barge and drowned in a navigable river. Those facts put the case in the twilight zone because prior law did not establish clearly exclusive state or federal jurisdiction. Thus, the Court concluded

that the state award was proper. The "twilight zone" as described by the Davis Court would not have encompassed Donald Simpson's injury. New ship construction was not in the twilight zone. Rather, Rohde established 20 years earlier that a state clearly had jurisdiction over such an injury.

"Twilight zone" cases subsequent to Davis, did not foreshadow Calbeck's grant of federal jurisdiction under the LHWCH to employees engaged in new shipbuilding.[7] The Supreme Court reaffirmed the validity of the Section 3(a) limitation to federal jurisdiction as recently as three years before Calbeck in the Hahn v. Ross Island Sand & Gravel Co., 358 U.S. 272 (1959). The Court began its decision as follows:

> By its terms, the Longshoremen's and Harbor Workers' Act does not apply 'if recovery for the disability or death through workmen's compensation proceedings may... validly be provided by state law'." Id. [emphasis is original].

The Court held that, when a case fell within the twilight zone, the fact that the employer was covered by the Longshoremen's and Harbor Workers' Act did not prevent a common lawsuit against him as a non-electing employer under the state act. Thus,

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[7] See Bethlehem Steel Co. v. Moores, 335 U.S. 874 (1948); Moores' case, 323 Mass. 162 (1948); Baskin v. Industrial Accident Commission, 338 U.S. 854 (1949); Keiser Co. v. Baskin, 340 U.S. 886 (1950).

Hahn reaffirmed the validity of the Section 3(a) limitation and further the avowed purpose of the Act as cited by the Davis Court "to permit state compensation protection whenever possible." Davis, supra at 252.

Thus, the case law establishes that the Calbeck decision, which established full concurrent federal jurisdiction in areas such as new ship construction which had previously been within the exclusive realm of state law, was not foreshadowed by prior law. See 4 Larson, supra § 89.25 at 16-168[8]

The second factor to be considered under the Chevron Oil analysis is whether the purposes of Calbeck will be furthered or retarded by retroactive application of it to the present case. Both the Benefits Review Board and the Court of Appeals concluded that the purpose of Calbeck was to implement Congress' desire to insure that a compensation remedy existed for all injuries sustained on navigable waters, avoiding uncertainty as to the source, state or federal, of that remedy. The purpose of Calbeck was to eliminate the potential "vacuum" of coverage, in which states refused to pay claims of maritime workers within an

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[8]Larson prefaces his section by discussing the concurrent jurisdiction established by Calbeck as follows: "But once more, the Supreme Court had a surprise in store for the profession." 4 Larson, supra at § 89.25 at 16-165.

area of "local concern." Denying retroactive operation of Calbeck, as the Benefits Review Board noted, would not defeat this purpose, because the employee received compensation under Maine's workers' compensation statute. He was not left without a remedy. The second underlying purpose of Calbeck was to eliminate the uncertainty, litigation, and flux in federal coverage which resulted from the incorporation of the maritime but local doctrine into the Section 3(a) proviso. The Benefits Review Board noted that retroactive application of Calbeck would not eliminate uncertainty and litigation, but rather would have the opposite effect. The Board noted that a flood of litigation would probably result by workers and employers similarly situated to the claimant and the employer in this case. As noted above, these claims would be fraught with evidentiary problems and would be so stale as to be impossible to defend.

Finally, we turn to the third criterion of the Chevron Oil analysis, which is whether retroactive application of the decision will have an unfair inpact on one party which outweighs the benefits to the other party. The Benefits Review Board concluded that applying Calbeck retroactively would result in great inequity to the employer. It is clear that the employer discharged its responsibilities to the claimant under the law as it stood at the time of the injury and for the duration of the state worker's

compensation benefits. Since it appeared that the Longshoremen's Act was inapplicable, the employer had no reason to file a Section 30(a) report during that period to start the running of the statute of limitations. The Benefits Review Board noted that to subject an employer at this late date to unexpected liability for an injury that occurred over 30 years ago would be unjust. The Court of Appeals' Decision to judge the reliance interests of the employer by case law that developed 20 years after the fact is erroneous and is inconsistent with the rule articulated by it in Jackson v. Justices of the Superior Court of Massachusetts, supra, and by the Court of Appeals for the District of Columbia in Wachovia Bank & Trust Co. v. National Student Marketing Corp., supra. The decision of the Court of Appeals warrants plenary review on the issue of the standards to be applied in considering retroactivity, and on the issue of the retroactivity of Calbeck.

II. The Opinion of the Court of Appeals for the First Circuit is Erroneous Insofar as it Conflicts With the Opinion of the Court of Appeals for the Fifth Circuit as Articulated in the Case of Shea v. Texas Employers' Ins. Assoc., 383 F.2d 16 (5th Cir. 1967)

In Shea v. Texas Employers' Ins. Assoc., supra, the Court of Appeals for the Fifth Circuit was confronted with a situation where an employee was

injured while working on board a vessel under construction but afloat in navigable waters. The employee had filed a claim under the state compensation act and recovered benefits pursuant to an award. Subsequently, the employee filed a claim under the Federal Longshoremen's and Harbor Workers' Act. After the state award and prior to any award of benefits under the Longshoremen's Act, the Calbeck decision was issued and established that the case was within the newly-created realm of concurrent jurisdiction for new ship construction. The employer raised as a defense the theory that the employee had made a binding election to recover benefits under the state act and that he was collaterally estopped from arguing in federal court that he did not satisfy the "may not validly be provided" clause in Section 3(a). The district court held that the employee had made a binding election of remedies by litigating to a final judgment in the forum of his choice. The Fifth Circuit sustained the result, but for different reasons:

> The district court placed major reliance on the concept of election of remedies. Whatever application that doctrine might have to a case arising after Calbeck v. Travelers Ins. Co....decided June 4, 1962, it has none to this case for the simple reason that in September of 1961 and February of 1962, when Drake's attorney was insisting that his case fell under the Texas Act, there was no choice.

The lower court decision in Shea, Texas Employers' Ins. Assoc. v. Calbeck, 249 F.Supp. 217, 220 (E.Dist. Texas 1966), affirmed on different grounds, Shea v. Texas Employers' Ins. Assoc., supra, recognized that prior to the 1972 amendments to the Longshoremen's Act, the doctrine of "election of remedies" provided a legitimate defense due to the now defunct Section 3(a) provision providing federal coverage only if recovery for disability or death may not be validly provided through state worker's compensation laws. Newport News Shipbuilding & Dry Dock v. Director, OWCP, 583 F.2d 1273, 1276 (4th Cir. 1978).[9] The Calbeck decision did not defuse that defense when it created a concurrent zone of federal and state jurisdiction for injuries such as the one involved in the instant case. The employer raised the

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[9]Both the First Circuit and the dissenting member of the Benefits Review Board erroneously rejected the election of remedies defense by relying on cases brought under the 1972 amendments. See, e.g., Sunship, Inc. v. Pennsylvania, 447 U.S. 715, 724 (1980). It should be noted that the 1972 amendments specifically deleted the Section 3(a) proviso upon which the election of remedies doctrine was based. The Court in Calbeck did not explicitly reject the election of remedies doctrine, they simply held that the mere acceptance of benefits in and of itself did not constitute a binding election. In this case, the employee did not merely accept voluntary benefits. Rather, he proceeded through litigation to an award and judgment which was satisfied.

election of remedies defense at all stages of this litigation and continues to assert it here, contending that the Court of Appeals erroneously rejected that defense. In evaluating the language in Calbeck, it should be noted that the Supreme Court stated, "and we agree that the circumstances do not support a finding of a binding election to look solely to state law for recovery." Calbeck, supra at 131. That statement reveals the Court's interest to retain the "election of remedies" doctrine under appropriate circumstances in the pre-1972 statute.

In a post-Calbeck case, Windrem v. Bethlehem Steel Corp., 293 F.Supp. 1 (D.N.J. 1968), the Court found circumstances constituting a binding "election of remedies" by the claimant. Mere acceptance of payments voluntarily made by an employer under state compensation law does not constitute a binding election. Id. at 5. However, when the injured employee in a "twilight zone" case prosecutes his claim to judgment under a valid state compensation law and liability then established is fully discharged by the employer, those circumstances constitute a binding election." Id. at 5-6. (See also Peter v. Agrien, 325 F.Supp. 1361, 1366 (Id. Penn. 1971), aff'd., 463 F.2d 252 (3rd. Cir. 1972); Holland v. Harrison Bros. Dry Dock & Repair Yards, 306 F.2d 369, 373 (5th Cir. 1962). In Windrem, the employee was represented by counsel and proceeded under the state

compensation statute. An award was made in his favor and the employer discharged his duty under the award. The Court held that the employee made a binding election of remedies which barred the claim under the federal statute. This case, similarly to Windrem, is not a case where there was a mere acceptance of voluntary payments under state law. Rather, the employee is represented by counsel and he actively enforced his rights under the state act and accepted satisfaction of final judgment.

If, arguendo, the Court of Appeals for the First Circuit is correct that Calbeck should be applied retroactively, then the Courts in Windrem and the lower court in Shea correctly applied the election of remedies doctrine barring claims under circumstances identical in all material respects with the facts presented at the case at bar.

The Fifth Circuit's decision in Shea, supra, supports the petitioner's argument that Calbeck was a radical departure from pre-existing law and should not be retroactively applied. If that view is erroneous, the proviso contained in Section 3(a) of the LHWCA, together with the Windrem decision and the lower court opinion in Shea establish that Donald Simpson made a binding "election of remedies" thereby precluding y resort to the Longshoremen's Act. These substantial issues of federal law, presenting conflicts among the Circuits regarding construction of federal statute and application of a case of the Supreme Court

deserve plenary review.

III. Conclusion

The Benefits Review Board characterized this case as one of first impression involving issues of far reaching import. It predicted that the result reached by the Court of Appeals below would produce a flood of litigation of stale claims. The Court of Appeals Decision below conflicts with the opinion of the Court of Appeals of the District of Columbia with regard to the standards to be applied in considering the question of retroactivity, and with the Court of Appeals of the Fifth Circuit with regard to the merits of the retroactivity issue. The petitioners urge this Court to reverse the result below, and to rule that this claim for benefits under the Longshoremen's and Harbor Workers' Compensation Act is barred by 33 U.S.C. § 903(a). Alternatively, the petitioners urge the Court to rule that the employee made a binding election of a state worker's compensation remedy under the statute as it existed at the time of his injury.

Respectfully submitted,
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